Supreme Court, U.S.
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No. 02 548

In The

Supreme Court of the United States

CZARINA, LLC,

Petitioner,

v.

KEMPER DE MEXICO, CAMPANIA DE SEGUROS, S.A., f/k/a/ SEGUROS LA TERRITORIAL S.A.,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Does the Commerce Clause prohibit the application of laws tolling statutes of limitation as to "absent" defendants during the time when those defendants are outside the jurisdiction of their courts? Does the availability of service of process, but not personal jurisdiction, over such defendants under the Inter-American Convention on Letters Rogatory alter the case?

Under the rules of full faith and credit and equal protection, may a court in one jurisdiction refuse enforcement to a valid judgment of another court on grounds that, as a practical matter, would not prevent enforcement of one of its own?

PARTIES

The parties to the proceedings being appealed from were Czarina, LLC, a Delaware limited liability corporation, Kemper de Mexico, Campania de Seguros, S.A., f/k/a Seguros La Territorial, S.A., an insurer located in Mexico, and ADA-VIS, Inc., garnishee, an insurance agent in California. The other parties to the litigation that resulted in the judgment sought to be enforced did not participate in the proceedings being appealed from and will be unaffected by its result. The managing members of Czarina, L.L.C. are Joseph S. Scognamiglio and Marcia Ruskin. It is privately held. Seguros La Territorial, S.A. changed its name to Kemper de Mexico, Campania de Seguros, S.A. after being acquired by subsidiaries of the Kemper Insurance Companies. By the time the Court of Appeals was informed, the case had already been briefed. It will be referred to herein as "Territorial."

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Opinions Below

The opinions of the United States Court of Appeals for the Ninth Circuit (App. 1, 3, 8) were not published but can be found at 2001 U.S. App. LEXIS 26629 and 2002 U.S. App. LEXIS 10205. The opinions of the District Court for the Southern District of California dated November 22, 1999 (App. 15) and December 9, 1999 (App. 27) were not published or reported. The judgment sought to be enforced, by the District Court for the Southern District of New York, was entered on February 7, 1984 and was not reported or published.

Statement Of The Basis For Jurisdiction

The judgment of the United States Court of Appeals for the Ninth Circuit was entered on May 23, 2002. A Petition for Rehearing And Suggestion For Rehearing *En Banc* was denied July 10, 2002. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). Petitioner's registration of judgment (Case No. 99-MC-108) sought relief pursuant to 28 U.S.C. § 1963. Petitioner's Complaint to enforce the judgment of the District Court in New York (Case No. 99-CV-01578) was based on 28 U.S.C. § 1332. The Court of Appeals determined that a statute of the State of California was unconstitutional as applied. Therefore 28 U.S.C. § 2403(b) may apply, and this Petition will be served on the Attorney General of the State of California. The Ninth Circuit Court of Appeals also certified to the Attorney General of the State of California that the constitutionality of a statute of California was drawn into question.

Constitutional And Statutory Provisions Involved

The Full Faith and Credit Clause of the Constitution provides:

> Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.

U.S. Const. Art. 4 § 1.

The Commerce Clause provides:

> Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.

U.S. Const. Art. 1 § 8.

The Fourteenth Amendment's Equal Protection Clause provides as follows:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States, and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const. Amend. XIV, § 1.

The California Code of Civil Procedure provides:

> § 335. The periods prescribed for the commencement of actions other than for the recovery of real property, are as follows: . . .
>
> § 337.5. Within 10 years: . . .
>
> An action upon a judgment or decree of any court of the United States or of any state within the United States.
>
> § 351. If, when the cause of action accrues against a person, he is out of the state, the action may be commenced within the term herein limited, after his return to the state, and if, after the cause of action accrues, he departs from the state, the time of his absence is not part of the time limited for the commencement of the action.

Cal. Code Civ. Proc. §§ 335, 337.5, 351.

Statement Of The Case

Although petitioner seeks to collect a very old reinsurance debt due from one foreign reinsurer to another, the case raises issues of importance to interstate and international commerce, as well as the relationship of American courts to their counterparts in other countries. It seeks to overturn a ruling of the Ninth Circuit Court of Appeals which simultaneously turned the Commerce Clause into a restraint on commerce, and denied a judgment from New York enforcement opportunities that would have been available to an equivalent judgment rendered in California.

Petitioner appealed from the dismissal of consolidated actions to enforce and register, in California, a judgment of a U.S. district court in New York against an insurance company from Mexico. A judgment rendered in New York is valid and enforceable for 20 years. N.Y. C.P.L.R. § 211(b). A judgment rendered in California is valid for ten years, Cal. Code Civ. Proc. § 683.020 but, as is true in many states but not in New York, may be renewed indefinitely. Cal. Code Civ. Proc. §§ 683.110, 683.130. Within the constraints of the Constitution, such variances are permissible. The question here is the application of the Full Faith and Credit, Commerce, and Equal Protection clauses to this discrepancy.

The Mexican insurance company contracted in New York. After encountering business reverses, it ceased to operate here and successfully withdrew all of its assets from the United States.[1] It permitted default judgment to be entered against it by a federal district court in New York in 1984. Years later, discovering that the Mexican company had begun doing business in California, Plaintiff registered the judgment in a federal district court in California and sought to garnish premiums collected for the Mexican company by a California agent. It also brought a separate action on the judgment in the same court, but before a different judge. The district courts vacated the registration and dismissed the action on the judgment on the ground that the California statute of limitations barred its enforcement. They rejected, on Commerce Clause grounds, the Plaintiff's claim that the California statute of limitations on

[1] It was, and remains, an active insurer in Mexico. It was recently acquired by a large U.S. based insurer group.

enforcement of judgments was tolled because of the Defendant's absence from the country.

The Ninth Circuit at first reversed the decisions of the lower courts, but then, on reconsideration, affirmed them. It ultimately held that, after 1988, the Mexican company was amenable to service under the Inter-American Convention on Letters Rogatory, S. Treaty Doc. 98-27, 98th Cong., 2d sess., (1984), pp. III-V, XII, *reprinted after* 28 U.S.C.A. § 1781 (hereinafter "Convention"), that therefore tolling of the statute of limitations should not take place, and that the Plaintiff's judgment was barred in California.

This decision is erroneous for two reasons. First, it inappropriately extends the decisions of this Court, such as *Bendix Autolite Corp. v. Midwesco Enterprises*, 486 U.S. 888 (1988). Applying *Bendix,* state and federal courts have held that tolling statutes may be invalid under the Commerce Clause if applied to an out-of-state defendant, if that defendant was both involved in interstate commerce and subject to effective service. The availability of effective service, sufficient to vest the court with jurisdiction to decide the case, and not just a means of delivering a summons, is a necessary premise to these holdings. If the court can readily obtain jurisdiction over the defendant through substituted service, the justification for tolling fades and the burden on commerce looms large. But the converse is also true: if the defendant really is out of a state's reach, he is not entitled to the benefit of the state's limitations laws. The Ninth Circuit, however, held that California's tolling statute is unconstitutional even when applied to a defendant that left the country to avoid its debts, was not involved in interstate or international

commerce in the U.S., and had no contacts with California. This took *Bendix* too far.

An alternate reading of the decision of the court of appeals is that the Convention creates a basis for personal jurisdiction over a defendant served under it, regardless of its contacts with the U.S. But such a holding, if intended, would have been plain error. The Convention expressly disclaims any such meaning.

The second error in this decision is that it subverts the rules of full faith and credit and equal protection. It creates discrimination, unintended by the California Legislature, between the enforcement opportunities available for California judgments and the equally valid judgments of other states. Under the Circuit's analysis, a foreign judgment is deprived of the benefit of renewal provisions that would be available to the owner of a locally rendered one. This is itself an unconstitutional burden on interstate commerce, a violation of the statutory and constitutional rules of full faith and credit, a violation of the equal protection clause of the Fourteenth Amendment, and an abrogation of California's right to make its own rules for enforcement of judgments.

History Of This Action

Argonaut Insurance Company, having undertaken to insure a risk, purchased reinsurance protection through intermediaries in New York from Halvanon Insurance Co.

In turn, Halvanon purchased reinsurance for the risk from, among others, Seguros La Territorial ("Territorial"), a Mexican insurer.[2] Argonaut incurred a covered loss and sued Halvanon in the U.S. District Court in New York to recover it. Halvanon filed a third-party complaint against its own reinsurers, including Territorial, seeking reimbursement for the agreed-upon share of what it was compelled to pay Argonaut.

At about the same time, Territorial discovered that its U.S. operations were unprofitable, and that its U.S. agent was of dubious integrity.[3] Although at first it appeared in the Argonaut/Halvanon case, soon Territorial decided to simply make itself scarce. It ceased to defend the case, and others like it, and removed its assets to Mexico. In 1984, after Halvanon paid Argonaut, it took a default judgment against Territorial for its share of what Halvanon had been required to pay Argonaut. The scandal arising out of Territorial's abandonment of its obligations waned, but Territorial never paid its debt to Halvanon.

By 1986, Halvanon was in financial trouble of its own. It was wound up by English and Israeli proceedings, and became subject to a Scheme of Arrangement, an English analog to a Plan under Chapter XI of the U.S. Bankruptcy Code. In 1998, to bring the Scheme to a speedier close, its

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[2] Halvanon was an Israeli insurer; Argonaut is an American one. All three companies were operating in the informal market for international reinsurance which once flourished in the city of New York. Czarina, LLC, Halvanon's assignee, is organized in Delaware and based in New York.

[3] There is no suggestion that Halvanon was responsible for the problems Territorial encountered.

Scheme Managers sold to Plaintiff, Czarina, LLC, Halvanon's rights to recover certain reinsurance balances due Halvanon, which the managers had so far been unable to liquidate. They included the judgment against Territorial.

Courtesy of the World Wide Web, Czarina discovered that Territorial had quietly returned to the U.S. market. It had appointed an agent in California who advertised (on the Internet) auto insurance for drivers crossing the border into Mexico. Deducing that the agent would have collected premiums and would owe them to Territorial, Czarina registered the New York judgment in a federal district court in California and sought to garnish the premium receipts in the hands of the U.S. agent. The agent protested. Czarina also filed a separate action on the judgment. Eventually Territorial itself appeared. The insurer and the agent sought to set aside the registration and dismiss the action on the judgment, asserting that the New York judgment, being more than ten years old, was stale by California standards even though it remained valid in New York.[4] Relying on *Abramson v. Brownstein*, 897 F.2d 389 (9th Cir. 1990), they denied that § 351 of the California Code of Civil Procedure could apply to toll causes of action against absent foreign corporations. The district judges summarily vacated the registration of the

[4] Judgment was rendered in 1984, after Territorial left the country. It returned eleven years later, in 1995. Czarina registered its judgment in California in 1999. Because the California statute of limitations is ten years, registration and enforcement were timely if the period was tolled between 1984 and 1995.

judgment and dismissed the action brought upon it. Huff Opinion at 9, App. p. 26; Rhoades opinion at 4, App. p. 31.

On appeal the two cases were consolidated. A panel of the Ninth Circuit at first reversed the lower courts, holding that § 351 could and should constitutionally be applied to a foreign corporation during the period when it was not amenable to effective service in California. *Abramson* had held that the tolling statute was an unconstitutional burden on commerce when applied to an out-of-state defendant reachable by substituted service, but the majority at first held that rationale did not apply when the would-be defendant lacked sufficient minimum contacts with the jurisdiction to permit service to be effective. According to *Abramson,* § 351 "forces a nonresident . . . to choose between being present in California . . . or forfeiture of the limitations defense, remaining subject to suit in California in perpetuity." 897 F.2d at 392. Although the state has a legitimate interest in "alleviat[ing] any hardship that would result by compelling plaintiff to pursue defendant out of state," that interest is outweighed by the specter of perpetual liability when the plaintiff has viable options for substituted service. *Id.* at 393.

In this case, however, even though several means existed to get a summons delivered to the defendant, *effective* service on Territorial would have been impossible between 1984 and 1995. Territorial had no known contacts with the state of California, minimum or otherwise, and no U.S. court could have acquired jurisdiction over it. The Court of Appeals explained that, during the period tolling was sought,

> there is no evidence in the record that Territorial was engaged in interstate commerce, or had any presence in California, or any other state. Where

> the defendant is not subject to service of process, the state interest in preserving a litigation forum is more compelling. . . . § 351 provides plaintiffs with their only means of pursuing valid claims against out of state defendants who could otherwise wait until expiration of the limitations period before returning to the state. Therefore, on the facts presented, we find that § 351 does not violate the Commerce Clause.

Memorandum, Dec. 11, 2001, at 7-8, App. p. 13.

Territorial sought rehearing. It asserted that it had "raised" the Convention in the court below, and that, although Czarina had "acknowledged" that service under the Convention was feasible, it "offered neither an explanation nor evidence" regarding its failure to employ it. Pet. For Rehearing at 3-4, App. p. 35. Territorial's argument was both inaccurate and a red herring. There had been no opportunity in the court below for Czarina to have presented "evidence;" the matter was decided on summary proceedings where Czarina's allegations should have been taken as true. But "explanation" there was in plenty – Czarina's recurrent point was that no matter what form of service was attempted, it would not have been effective to bring Territorial within the jurisdiction of the California courts between 1988 and 1995.

Substantially without explanation, the Panel reversed itself. Ignoring its own analysis, but tracking Territorial's inaccurate argument, it held that:

> La Territorial was amenable to service under the Convention protocol, but there is no indication that Czarina tried to accomplish substituted service pursuant to the Convention. Having offered no explanation or evidence for failing to do so,

> there is no basis for *tolling* the ten-year statute of limitations because service was available during the statutory period.

Memorandum on Rehearing, July 10, 2002 at 3-4, App. p. 5 (italics in original). The Panel did not explain why its earlier holding, that tolling should be denied only when service was both available and potentially effective, had been abandoned. In sum, the Panel held that the Commerce Clause invalidated California's tolling statute for any Mexican corporation, even if it had done nothing to "purposely avail itself of the privilege of conducting activities" in California.

Czarina's petition for rehearing *en banc* was denied. App. p. 34.

Argument

I. The Commerce Clause Does Not Invalidate A Law Tolling The Statute Of Limitation Against Enforcement Of Judgments While The Defendant Is Absent From The Jurisdiction And Not Subject To Effective Service Of Process.

California, like every state, tolls the running of statutes of limitation while the defendant is "absent" from the jurisdiction. Cal. Code Civ. Proc. § 351. This rule has two purposes: it ensures that statutes of limitation do not deprive a claimant of his remedy before he has an opportunity to enforce it, and it ensures that the courts are not burdened with prophylactic filings unlikely to result in useable judgments.

Statutes like § 351 have been somewhat overtaken by modern business practices and development of long-arm jurisdiction. § 351 tolls the running of the statute against any "person" who is "out of the state" when a cause of action accrues, or "departs from the State" thereafter, until his "return." Cal. Code Civ. Proc. § 351. It does not contemplate the possibility that long-arm service might be readily available against such defendants.

Tolling statutes like § 351 patently discriminate against residents of other states. They can only be justified if they serve a sufficient local interest. Following *Bendix Autolite Corp. v. Midwesco Enterprises*, 486 U.S. 888 (1988), most state and federal courts agree that tolling is an improper burden on interstate commerce unless it is justified by the need to ensure that residents do not lose their remedies before they can be effectively enforced. *Coons v. American Honda Motor Co., Inc.*, 463 A.2d 921, 926 (N.J. Sup. Ct. 1983), *cert. denied*, 469 U.S. 1123 (1985). When a defendant is "out of the state" but can still be made subject to an effective judgment without undue difficulty, tolling statutes based on his "absence" should not apply. *Hurwich v. Adams,* 155 A.2d 591, 594 (Del. 1959); *Muller v. Custom Distributors, Inc.,* 487 N.W.2d 1, 3 (Neb. 1992); *Juzwin v. Asbestos Corp., Ltd.*, 900 F.2d 686, 696 (3rd Cir. 1990), *cert. denied*, 489 U.S. 896 (1990); *Bottineau Farmers Elevator v. Woodward-Clyde Consultants*, 963 F.2d 1064, 1074 (8th Cir. 1992). Like the other states, California does not apply § 351 to foreign corporations if they are subject to effective substituted service. *Loope v. Greyhound Lines, Inc.,* 250 P.2d 651, 652 (Cal. Ct. App. 1952); *Cardoso v. American Medical Systems, Inc.,* 228 Cal. Rptr. 627, 628-9 (Cal. Ct. App. 1986). Its courts

balked at applying the same rule to non-resident individuals, *Dew v. Appleberry*, 591 P.2d 509 (1979), but the Ninth Circuit filled the breach, holding that to deny them the protection of tolling when they could readily be sued in California courts would also be an unconstitutional burden on interstate commerce. *Abramson v. Brownstein*, 897 F.2d 389, 393 (9th Cir. 1990).

It is *effective* service that eliminates the justification for tolling, not the simple fact that a summons can find its way to the defendant. *Financial Bancorp, Inc., v. Pingree & Dahle, Inc.*, 880 P.2d 14, 18 (Utah 1994) (*applying California law.*) If a defendant can be reached by a process server, but the court cannot render an enforceable judgment against him, then the justification for tolling against absent defendants still applies. Otherwise, the statute of limitation will deprive the claimant of his remedy before he has the opportunity to seek it. The Ninth Circuit stands alone in deciding that the Commerce Clause invalidates a tolling statute when applied to a defendant who could have been served but was not subject to the jurisdiction of the court.

II. Notwithstanding Procedural Laws Suggesting Otherwise, No Defendant Is Subject To The Jurisdiction Of A U.S. Court Unless He Possesses "Minimum Contacts" With The State Where It Is Located.

The court of appeals held that Territorial was "amenable" to service of process under the Inter-American Convention during the period between 1988 and 1995. It therefore refused to toll the statute of limitation during that period.

It is undisputed, on this record, that Plaintiff was outside the reach of the California courts between 1984 and 1995. "Amenability" to service means more than simply being within reach of a process server. A defendant is not amenable to process unless he is so situated that the court issuing the process can legitimately and effectively assume jurisdiction over him. *See Bott v. American Hydrocarbon Corp.*, 441 F.2d 896 (5th Cir. 1971). In holding that Territorial would have been amenable to service issued by a California court, even though it had no contacts at all with the jurisdiction, the court of appeals misconstrued the purpose and effect of the Inter-American Convention.

A. The Inter-American Convention On Letters Rogatory Specifically Disclaims Any Impact On Jurisdiction.

Congress has not seen fit to enter into treaties and conventions generally entitling foreign court judgments and process to recognition in the U.S. As a result, U.S. process and judgments are recognized overseas only on limited and case-specific bases. The Inter-American Convention on Letters Rogatory, S. Treaty Doc. 98-27, 98th Cong., 2d sess., (1984), pp. III-V, XII, *reprinted after* 28 U.S.C.A. § 1781 (hereinafter "Convention") is one such basis, but it is strictly limited. It entered into effect, as between the U.S. and Mexico, on July 28, 1988. It applies to "letters rogatory" issued in civil proceedings, whose purpose is "[t]he performance of procedural acts of a merely formal nature, such as service of process, summonses or subpoenas abroad." Convention, Art. 5. Before a U.S. court may issue such a letter of request, however, it must be authorized to do so by its own laws.

The Convention is not a submission to the jurisdiction of U.S. courts by Latin American corporations. "Execution

of letters rogatory shall not imply ultimate recognition of the jurisdiction of the judicial or other adjudicatory authority issuing the letter rogatory or a commitment to recognize the validity of the judgment it may render or to execute it." Convention, Art. 9. The Convention merely provides a method by which service, issued by a U.S. court pursuant to its existing procedures, may be accomplished overseas. It does not control whether that service will be effective to provide a U.S. court with personal jurisdiction over the defendant so served, or require a Mexican court to recognize any judgment the U.S. court might render. The Convention does not, and was not meant to, subject the residents of Mexico willy-nilly to the personal jurisdiction of U.S. courts. Some proper basis for jurisdiction of the courts must still exist.

Because the Convention does not provide an independent basis for jurisdiction over a foreign defendant, the court of appeals erred if it held that, standing alone, the Convention could have authorized California courts to assume jurisdiction over Territorial between 1988 and 1995.

B. Notwithstanding The Convention, The Constitution Will Not Allow A Court To Assume Jurisdiction Over A Defendant Who Does Not Have Minimum Contacts With The State In Which It Sits.

Even if the Convention dealt with jurisdiction instead of service, it could not authorize U.S. courts to exercise jurisdiction outside the constitutional limits established by U.S. law. In *International Shoe Co. v. Washington*, 326 U.S. 310 (1956), this Court held that U.S. courts' jurisdiction was limited to defendants with sufficient "minimum

contacts with [the state] such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice." 326 U.S. at 316. No court, state or federal, may exercise jurisdiction over a defendant outside its boundaries unless the defendant has taken some step to "purposefully avail[ ] itself of the privilege of conducting activities" there. *Hanson v. Denckla*, 357 U.S. 235, 253 (1958). This rule is applied with special sensitivity in the case of foreign entities. The Constitution offers foreign corporations "fair play and substantial justice" in U.S. courts. "The unique burdens placed upon one who must defend oneself in a foreign legal system should have significant weight in assessing the reasonableness of stretching the long arm of personal jurisdiction over national borders." *Asahi Metal Industry Co., Ltd. v. Superior Court*, 480 U.S. 102, 114 (1987).

Following *International Shoe*, broad service of process statutes are interpreted to extend the capacity for service to any situation where it would be consistent with minimum contacts, but not beyond it. *Stone v. Texas,* 90 Cal. Rptr. 2d 657, 659 (Cal. Ct. App. 1999). If service is improperly extended to a party that lacks such contacts with the state, it must be quashed. Cal. Code. Civ. Proc. § 418.10; *Fell (Frederick), Inc. v. Superior Court*, 111 Cal. Rptr. 219, 222 (Cal. Ct. App. 1973).

On rehearing, the panel suggested that Czarina had failed to prove that Territorial was, indeed, "absent", and that Plaintiff had provided "no evidence or explanation" for its failure to employ the Convention. This was an incorrect shift of the burden of proof. At the point where both actions were dismissed, Plaintiff had not yet had the opportunity to prove that Territorial was absent from the jurisdiction. Registration of the judgment was stricken by

the first court *sua sponte* after it denied Petitioner's Application For An Order In Aid of Partial Enforcement. Huff Order at 3, App. p. 25. The court did not hear evidence regarding Territorial's absence from the jurisdiction. Likewise, the enforcement action was dismissed on a motion under Rule 12(b)(6). Rhoades Opinion at 4, App. p. 31. At this stage of both proceedings, the courts were required to accept Plaintiff's allegations regarding the absence of Territorial as true, or else suspend decision until evidence one way or another could be produced. *Zinermon v. Burch*, 494 U.S. 113, 118 (1990).

If "evidence" of the reason for Plaintiff's failure to employ the convention was lacking, "explanation" certainly was not. As the Panel itself had recognized on its first consideration of the case, Memorandum December 11, 2001 at 7, App. p. 12, the explanation was simply that any attempt at service between 1984 and 1995 would have been futile, not because Territorial could not be located, but because it was not subject to personal jurisdiction over it in California.

Holding that Territorial was "amenable" to the jurisdiction of the California courts solely because it could be served under the Inter-American Convention, and that the Commerce Clause therefore overrode § 351, the Panel applied the Convention in a way that its drafters never intended and expressly disclaimed, and it flouted the fundamental constitutional requirement that no U.S. court claim personal jurisdiction over parties that do not have sufficient contact with them to make an assertion of authority over them fair and just. The decision must therefore be reversed.

III. The Rule Created By The Court Of Appeal Discriminates Between The California And Foreign Judgments In Violation Of The Full Faith And Credit And Equal Protection Clauses.

In denying Plaintiff the benefit of the California tolling provisions, the court of appeals applied the Commerce Clause to produce a decidedly uncommercial result: Judgment creditors must register their judgments in every district court in the country, and keep them "live" under all of the applicable local rules, on the chance that the debtor might someday own leviable assets in one of them. Such broadcast filing would serve no good purpose. It would burden both courts and parties with a clutter of needless registrations. States are entitled to construct their rules for enforcement of judgments to suit their own policies, provided they do not "la[y] an uneven hand on causes of action arising within and without the forum state." *Wells v. Simonds Abrasive Co.*, 345 U.S. 514, 518 (1954); *see also Watkins v. Conway*, 385 U.S. 188, 189 (1966).

California is within its rights not to require registry of judgments until they will be useful. Indeed, if California had adopted a rule denying foreign judgment creditors the benefit of tolling provisions, that might well have violated the Equal Protection Clause. *Haughton v. Haughton*, 394 N.E.2d 385, 388 (Ill. 1979). But California has adopted no such rule. Indeed, it has regularly applied tolling provisions in the enforcement of foreign judgments, and in favor of non-resident creditors. *Chappell v. Thompson*, 131 P. 82 (Cal. Dist. Ct. App. 1913); *Green v. Zissis*, 7 Cal. Rptr. 2d 406 (Cal. Ct. App. 1992). *Accord*, *Haughton v. Haughton*, 394 N.E.2d 385 (Ill. 1979); *McFarlane v. McFarlane*, 566

N.W.2d 297 (Mich. Ct. App. 1997). Ironically, the court of appeals imposed it instead, through a misapplication of the Commerce Clause.

There is an important difference between the role of statutes of limitation as applied to the commencement of suits, and their role as applied to actions to enforce judgments. In the former case, an overbroad application of tolling rules might create the situation described in *Abramson*: an out-of-state defendant might be subject to suit "in perpetuity," whereas a local defendant was not. *Abramson*, 897 F.2d at 392. This is, of course, precisely the discrimination against sister state foreign business that the Commerce Clause prohibits.

When the same logic is applied to actions to *enforce* judgments, the balance of convenience tips the other way. In many states, including California, a judgment once rendered is already enforceable almost in perpetuity, as long as the owner is prepared to undertake minimal steps every ten years to renew it. The judgment may be revived by filing an action on it even though the defendant has in the meantime left the state. *Huff v. Pharr*, 748 F.2d 1553, 1555 (11th Cir. 1984). Unfortunately, a judgment creditor from another state cannot take advantage of this technique to extend the life of his lien until he has domesticated it. To commence an action on his judgment, he must somehow obtain effective service.[5] If the judgment was

[5] One case holds, as a matter of first impression and without analysis, that no requirement of minimum contacts applies to registration of judgments under 28 U.S.C. § 1963. *Dichter v. Disco Corp.*, 606 F. Supp. 721 (S.D. Ohio 1984). In the parallel situation of enforcement of foreign arbitral awards under the New York Convention, recent

(Continued on following page)

entered elsewhere and the debtor is not in California, the court will not have jurisdiction to grant the requested relief. *Huff v. Pharr*, 748 F.2d 1553, 1554-5 (11th Cir. 1984). California's legislature has provided against that possibility by adopting § 351, which protects the creditor from loss of his rights during the time when he cannot enforce them. But, under the law as applied by the court of appeals, if an out-of-state judgment cannot be enforced in California during the first ten years of its life, it cannot be enforced at all, even though it remains valid in the state of its rendition, or has even been revived there.

The burden, on both the judgment owner and the courts, of requiring the owner to register or sue upon judgments in California when he has no reason to think that the debtor is in California or ever likely to go there, is significant, especially when multiplied 49 times to cover the other states where the debtor is not, but might someday go. This is a rule which "unreasonably restricts or oppressively burdens the enforcement of a judgment." *Lamb v. Powder River Live Stock Co.*, 132 F. 434, 440 (8th Cir. 1904). While there is no discriminatory impact in a rule which renders the out-of-state defendant perpetually

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caselaw holds that enforcement is only possible where the defendant has minimum contacts or assets subject to levy. *Base Metal Trading, Ltd. v. Ojsc Novokuznetsky Aluminum Factory*, 283 F.3d 208 (4th Cir. 2002); *Creighton Ltd. v. Government of Qatar*, 181 F.3d 118 (D.C. Cir. 1999); *Glencore Grain Rotterdam B.V. v. Shivnath Rai Harnarain Co.*, 284 F.3d 1114 (9th Cir. 2002). But even if registration under § 1963 were possible in defendant's absence, the equal protection problem would persist. The right to bring an action on the judgment is a valuable adjunct to registration; to deprive a non-resident of the flexibility it offers would be unreasonably discriminatory.

subject to judgment enforcement (because the local defendant is, too), there is certainly a discriminatory impact in a rule which provides that foreign judgments may only be enforced by an action brought within ten years, whereas local ones may be enforced perpetually. In denying the benefit of tolling to unregistered foreign judgments, the court of appeals disregarded the requirements of full faith and credit and equal protection.

Article 4, Section 1 of the Constitution demands that, "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State." Congress has adopted the logical corollary that the same rule applies among federal courts as well. 28 U.S.C.S. § 1738. Thus, the Constitution demands, and Congress has affirmed, that judgments from each state be enforced in every other state. This Court once appeared to hold that the establishment of different limitations periods for local and foreign judgments was proper, *M'Elmoyle v. Cohen*, 38 U.S. 312, 327 (1839), but in *Watkins v. Conway*, 385 U.S. 188, 189 (1966), it held that such discrimination, if genuine, would be intolerable.

Watkins presented the converse of the facts here. The plaintiff brought his five-year-old Florida judgment to Georgia, where it encountered a statute of limitations for the enforcement of foreign judgments that was shorter than the one applicable to local ones. Georgia courts had mitigated that discrimination by holding that the period commenced, not on the date the judgment was entered, but when the judgment was revived in its home state. Mr. Watkins could still revive his judgment in Florida and then obtain its enforcement in Georgia. Therefore the Georgia statute was not unconstitutional, as applied, to

Watkins. But this Court issued a plain warning, too, emphasizing how narrowly the Georgia law had avoided displacement. If the statute were applied to a judgment from a state that did not provide for renewal, so that it actually deprived the creditor of his remedy in Georgia, then it "could not possibly stand against an equal-protection claim." *M'Elmoyle v. Cohen* did not "justify the discriminatory application of a statute of limitations to foreign actions." *Watkins,* 385 U.S. at 189. If discrimination had actually occurred, "we would be faced with a different case." *Id.* at 191. This Court cited, as one of those "different cases," *Frank v. Wolf*, 87 S. E. 697 (Ga. Ct. App. 1916), where the Georgia court had applied the discriminatory limitations law to a judgment which could not be rescued by revival.

New York does not consider that its judgments become dormant. It applies a conclusive presumption of payment after 20 years, instead. It has no provision for revival, or for that matter, tolling. N.Y. C.P.L.R. § 211(b). This is one of those "different case[s]."

Until displaced by the court of appeals, California's tolling law offered foreign creditors the equal protection of California laws, and afforded genuine full faith and credit to sister state judgments. So long as the New York judgment remained viable and Territorial remained out of reach, the California tolling statute protected the creditor's rights to enforce his judgment, on substantially the same basis as local ones. The court of appeals, on the other hand, contradicted *Watkins* and deprived Czarina of the equal benefit of California law. It distorted the Commerce

Clause and violated the equally compelling mandates of full faith and credit and equal protection. It calls for reversal.

Conclusion

The promotion of interstate and international commerce requires both that the law treat foreign traders fairly and that it avoid intra-jurisdictional loopholes whenever possible. So long as the states' civil procedures vary, some gaps will be unavoidable, but the federal courts should not expand them. In its zeal to protect non-resident debtors from discrimination, the Ninth Circuit has damaged the rights of foreign creditors. It disrupted the balance of interests established by California law, without offering anything better. In the name of the Commerce Clause, it denied equal protection to the Plaintiff and made full faith and credit a hollow promise. This Court should grant certification to ensure the courts which rely on its guidance do not lose sight of the larger objectives of the Commerce Clause while applying its terms.

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UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ARGONAUT INSURANCE COMPANY, Plaintiff, v. HALVANON INSURANCE COMPANY, Defendant.	No. 99-57012 D.C. CV-99-00108-MLH/RBB ORDER GRANTING PETITION FOR REHEARING AND WITHDRAWING MEMORANDUM
HALVANON INSURANCE COMPANY, Third-Party-Plaintiff-Appellant, v. REASURANSI UNUM INDONESIA, SEGUROS LA REPUBLICA S.A.; MILLI RESASURANS T.A.S.; ADMINISTRATIA ASIGURARILOR DE STAT; KEMPER DE MEXICO, CAMPANIA DE SEGUROS S.A.; ALLAMI BIZTOSTITO; NORTHWEST FACILITIES INC; C.J.V. ASSOCIATES INC; SRMC MANAGEMENT CORP; M.T.R. AGENCIES LTD; DEPENDABLE INSURANCE AGENCIES LIMITED; PLANET COVERAGES INC; INRAM; ADA VIS GLOBEL ENTERPRISES, Third-Party-Defendants-Appellees.	(Filed May 23, 2002)

CZARINA LLC, Plaintiff-Appellant, v. SEGUROS LA TERRITORIAL, Defendant-Appellee.	No. 99-57013 D.C. CV-99-01578-JSR (CGA)

Before: RYMER and RAWLINSON, Circuit Judges, and POGUE,* CIT Judge.

The appellee's motion for leave to file a late petition for rehearing is GRANTED. The petition for rehearing received March 8, 2002, shall be deemed filed.

Judges Rymer and Pogue vote to grant the petition for rehearing, and Judge Rawlinson votes to deny. The petition for rehearing is GRANTED.

The memorandum filed December 11, 2001, is withdrawn.

* Honorable Donald C. Pogue, Judge, Court of International Trade, sitting by designation.

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ARGONAUT INSURANCE COMPANY, Plaintiff, v. HALVANON INSURANCE COMPANY, Defendant.	No. 99-57012 D.C. CV-99-00108-MLH/RBB MEMORANDUM* (Filed May 23, 2002)
HALVANON INSURANCE COMPANY, Third-Party-Plaintiff-Appellant, v. REASURANSI UNUM INDONESIA, SEGUROS LA REPUBLICA S.A.; MILLI RESASURANS T.A.S.; ADMINISTRATIA ASIGURARILOR DE STAT; KEMPER DE MEXICO, CAMPANIA DE SEGUROS S.A.; ALLAMI BIZTOSTITO; NORTHWEST FACILITIES INC; C.J.V. ASSOCIATES INC; SRMC MANAGEMENT CORP; M.T.R. AGENCIES LTD; DEPEND-	

* This disposition is not appropriate for publication and may not be cited to or by the court of this circuit except as may be provided by Ninth Circuit Rule 36-3.

ABLE INSURANCE AGENCIES LIMITED; PLANET COVERAGES INC; INRAM; ADA VIS GLOBEL ENTERPRISES,

Third-Party-Defendants-Appellees.

Appeal from the United States District Court
for the Southern District of California
Marilyn L. Huff, District Judge, Presiding

CZARINA LLC,

Plaintiff-Appellant,

v.

SEGUROS LA TERRITORIAL,

Defendant-Appellee.

No. 99-57013

D.C. CV-99-01578-JSR (CGA)

MEMORANDUM

Appeal from the United States District Court
for the Southern District of California
John S. Rhoades, District Judge, Presiding

Submitted July 10, 2001**
Pasadena, California

Before: RYMER and RAWLINSON, Circuit Judges, and POGUE,*** CIT Judge.

In these consolidated appeals, Czarina, L.L.C. challenges the district court's order in No. 99-57012 vacating

** The panel unanimously finds this case suitable for decision without oral argument. Fed. R. App. P. 34(a)(2).

*** Honorable Donald C. Pogue, Judge, Court of International Trade, sitting by designation.

Czarina's writ of execution against Seguros La Territorial (now Kemper de Mexico, Compania de Seguros, S.A., which we refer to as "La Territorial"), and an order in No. 99-57013, granting La Territorial's motion to dismiss Czarina's complaint seeking the same assets that were sought in its application for issuance of the writ of execution on third-party ADA VIS, La Territorial's California broker. Both actions arise out of Czarina's efforts to collect a judgment obtained by its predecessor in interest, Halvanon Insurance Company, against La Territorial. The district court in No. 99-57012 ruled that the application was time-barred, and the court in No. 99-57013 dismissed the complaint on the ground of res judicata. We agree that Czarina failed to show that service of process was unavailable during the ten-year limitations period imposed by Cal. Civ. Proc. Code § 337.5. Accordingly, there is no basis for applying the tolling provisions of Cal. Civ. Proc. Code § 351.

It is undisputed that La Territorial is a Mexican corporation. The Inter-American Convention on Letters Rogatory, 28 U.S.C. § 1781, became effective in the United States in 1988. Mexico and the United States are signatories. La Territorial was amenable to service under the Convention protocol, but there is no indication that Czarina tried to accomplish substituted service pursuant to the Convention. Having offered no explanation or evidence for failing to do so, there is no basis for *tolling* the ten-year statute of limitations because service was available during the statutory period. For this reason, Czarina's actions are barred.

Given this disposition, we have no need to reach other issues raised by either party.

AFFIRMED.

RAWLINSON, Dissenting:

Because Section 2111 of the California Corporations Code ("Section 2111") provides for service of process on a foreign corporation through the Secretary of State, California courts have held that Section 2111 renders the provisions of § 351 inapplicable to foreign corporations that are amenable to service of process through the Secretary of State. *Cardoso v. American Medical Systems, Inc.*, 228 Cal. Rptr. 627, 630 (Cal. Ct. App. 1986); *see also Loope v. Greyhound Lines, Inc.*, 250 P.2d 651, 614 (Cal. Ct. App. 1952).

The California cases contain no reference to service of process under the provisions of the Inter-American Covention on Letters Rogatory. Further, in *Herring v. Peterson*, 172 Cal. Rptr. 240, 242 (Cal. App. 1981), a California appeals court recognized that the "words amenable to service of process include any procedural requirement that must be met before the court obtains or regains jurisdiction." (internal quotation marks omitted). Minimum contacts must exist before a court may exercise jurisdiction. *See International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945); *see also Simms v. Steverson*, 106 Cal. Rptr. 2d 193, 205 (Cal. App. 2001). Thus, if a corporation does not have contacts with the state of California, and California cannot exercise personal jurisdiction over the corporation, the corporation is not amenable to service of process under Section 2111.

There is no evidence in the record that Territorial had contact with the state of California prior to 1995. Absent contacts, California could not exercise personal jurisdiction over Territorial. Therefore, Territorial was not amenable to service of process, and the tolling provision set forth in § 351 is not affected by Section 2111. Accordingly, I would reverse.

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ARGONAUT INSURANCE COMPANY, Plaintiff, v. HALVANON INSURANCE COMPANY, Defendant.	No. 99-57012 D.C. CV-99-00108-MLH/RBB MEMORANDUM* (Filed Dec. 11, 2001)
HALVANON INSURANCE COMPANY, Third-Party-Plaintiff-Appellant, v. ERASURANSI UNUM INDONESIA, SEGUROS LA REPUBLICA S.A.; MILLI RESASURANS T.A.S.; ADMINISTRATIA ASIGURARILOR DE STAT; KEMPER DE MEXICO, CAMPANIA DE SEGUROS S.A.;	

* This disposition is not appropriate for publication and may not be cited to or by the court of this circuit except as may be provided by Ninth Circuit Rule 36-3.

ALLAMI BIZTOSTITO; MORTHWEST [sic] FACILITIES INC; C.J.V. ASSOCIATES INC; SRMC MANAGEMENT CORP; M.T.R. AGENCIES LTD; DEPENDABLE INSURANCE AGENCIES LIMITED; PLANET COVERAGES INC; INRAM; ADA VIS GLOBEL ENTERPRISES,

Third-Party-Defendants-Appellees.

Appeal from the United States District Court
for the Southern District of California
Marilyn L. Huff, District Judge, Presiding

CZARINA LLC,
Plaintiff-Appellant,
v.
SEGUROS LA TERRITORIAL,
Defendant-Appellee.

No. 99-57013

D.C. CV-99-01578-JSR (CGA)

MEMORANDUM

Appeal from the United States District Court
for the Southern District of California
John S. Rhoades, District Judge, Presiding

Submitted July 10, 2001**
Pasadena, California

Before: RYMER and RAWLINSON, Circuit Judges, and POGUE,*** CIT Judge.

** The panel unanimously finds this case suitable for decision without oral argument. Fed. R. App. P. 34(a)(2).

*** Honorable Donald C. Pogue, Judge, Court of International Trade, sitting by designation.

Czarina[1] appeals the district court's dismissal of its suit against ADA VIS[2] ("Territorial") on the basis that the statute of limitations had expired. According to the district court, the statute of limitations on Czarina's claims was not tolled by Section 351 of the California Code of Civil Procedure because Territorial could have been served through the Secretary of State in accordance with Section 2111 of the California Corporations Code. Czarina alleges the district court's interpretation of California's tolling statute was erroneous. For the following reasons, we agree, and reverse the decision below.

I. Statute of Limitations

We review the district court's interpretation of state law de novo. *Downey v. Crowley Marine Services*, 236 F.3d 1019, 1022 (9th Cir. 2001). Section 337.5 of the California Code of Civil Procedure places a ten year limitations period on actions upon a judgment of any court. Generally, the limitations period is tolled when the defendant is absent from the state. CAL. CIV. PROC. CODE § 351 (West 1982) ("§ 351"). However, because Section 2111 of the California Corporations Code ("Section 2111") provides for service of process on a foreign corporation through the Secretary of State, California courts have also held that Section 2111 renders the provisions of § 351 inapplicable to foreign corporations which are amenable to service of process through the Secretary of State. *Cardoso v. American Medical Systems, Inc.*, 228 Cal. Rptr. 627, 630 (Cal. Ct.

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[1] Czarina is the assignee of Halvanon Insurance Company.

[2] ADA VIS is the California broker for La Territorial ("Territorial").

App. 1986) (finding the statute of limitations had run because "the availability of substituted service of process upon a foreign corporation renders the tolling provisions of section 351 inapplicable"); *see also Loope v. Greyhound Lines, Inc.*, 250 P.2d 651 (Cal. Ct. App. 1952) (declining to apply § 351 if the defendant is a foreign corporation "in view of the California statutory provisions relative to service of summons upon foreign corporations.")

Czarina alleges that § 351's tolling provision still applies because the above cited cases can be distinguished from this one. According to Czarina, the corporation in *Loope* as well as the corporation in *Cardoso* had minimum contacts with the state of California; thus, they could be effectively served. Here, they allege Territorial could not have been effectively served, even under the provisions of Section 2111, because it lacked minimum contacts with the state.

California's long-arm statute permits the exercise of jurisdiction over nonresidents on any basis consistent with the federal or state Constitution. CAL. CIV. PROC. § 410.10 (West 1973); *Stone v. Texas*, 90 Cal. Rptr. 2d 657, 659 (Cal. Ct. App. 1999). Nonetheless, if a summons is served on an individual who is not subject to California's jurisdiction, service is not effective and may be quashed. CAL. CIV. PROC. § 418.10 (West 1973). In *Herring v. Peterson*, 172 Cal. Rptr. 240, 242 (Cal. App. 1981), a California appeals court recognized that the "words amenable to service of process include any procedural requirement that must be met before the court obtains or regains jurisdiction." (internal quotations omitted). Minimum contacts are clearly a requirement that must exist before a court may exercise jurisdiction. *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945); *Simons*

v. Steverson, 106 Cal. Rptr. 2d 193, 205 (Cal. App. 2001). Thus, if a corporation does not have contacts with the state of California, and California cannot exercise personal jurisdiction over the corporation, the corporation is not amenable to service of process under Section 2111.

Territorial is a foreign corporation having no contact with the state of California prior to 1995. Absent contacts, California could not exercise personal jurisdiction over Territorial. Therefore, Territorial was not amenable to service of process, and the tolling provision set forth in § 351 is not affected by Section 2111. Accordingly, we find that the district court erred in dismissing Czarina's action against Territorial as time barred, because Czarina's cause of action was tolled by § 351.[3]

II. Commerce Clause

Although tolling under § 351 applies to this case, we must still determine whether § 351 violates the Commerce Clause. In *Abramson v. Brownstein*, 897 F.2d 389, 392 (9th Cir. 1990), we held that § 351 violated the Commerce Clause because it "forces a nonresident individual engaged in interstate commerce to choose between being present in California for several years or forfeiture of the limitations defense, remaining subject to suit in California [sic] perpetuity." In *Abramson*, the defendant was subject to

[3] Territorial has never alleged that the Inter-American Convention on Letters Rogatory renders the tolling provisions of § 351 inapplicable. This issue was never addressed by the district court, and we will not address it either. *United States v. Miller*, 482 F.2d 1379 (9th Cir. 1973) (declining to reach question not raised below or on appeal).

service of process, and the state had an interest in alleviating "any hardship that would result by compelling plaintiff to pursue defendant out of state." *Id.* at 393. Nonetheless, the state's interest was outweighed by the burden on interstate commerce.

This case is distinguishable from *Abramson*. In this case, there is no evidence in the record that Territorial was engaged in interstate commerce, or had any presence in California, or any other state. Where the defendant is not subject to service of process, the state interest in preserving a litigation forum is more compelling.[4] As stated in *Abramson*, the burden of subjecting foreign companies to liability in perpetuity is a burden on interstate commerce. *Id.* at 392. However, § 351 provides plaintiffs with their only means of pursuing valid claims against out-of-state defendants who could otherwise wait until expiration of the limitations period before returning to the state. Therefore, on the facts herein presented, we find that § 351 does not violate the Commerce Clause.[5]

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[4] Czarina concedes that Territorial could have been served through Section 2111 since 1995 when Territorial began selling insurance through ADA VIS. This fact does not affect our analysis. If the ten-year statute of limitations was tolled from 1984 until 1995, this suit, filed in 1999, was timely.

[5] When a federal court is asked to decide an issue which involves the constitutionality of a state statute effecting the public interest and in which the state is not a party to the action, 28 U.S.C. 2403(b) requires the court to certify the constitutional question to the state attorney general. The district court failed to certify the question to the Attorney General of California. However, certification is allowed at any stage of the proceeding. *See Glidden Co. v. Zdanok*, 368 U.S. 814, 7 L. Ed. 2d 22, 82 S. Ct. 56 (1961) (Supreme Court certified question and United States intervened). We hereby certify the constitutional

(Continued on following page)

REVERSED.

RYMER, Circuit Judge, dissenting:

I agree with the district court that Cal. Code Civ. Proc. § 351 does not toll the 10-year statute of limitations imposed by § Cal. Code Civ. Proc. § 337.5 as to Territorial because § 351 does not apply to foreign corporations. *Loope v. Greyhound Lines, Inc.*, 114 Cal. App. 2d 611, 614 (1952); *Cardoso v. American Medical Systems, Inc.*, 183 Cal. App. 3d 994, 999 (1986); *see also Abramson v. Brownstein*, 897 F.2d 389, 393 n.6 (9th Cir. 1990) (noting that § 351 does not apply to foreign corporations). Territorial is a foreign corporation that Czarina failed to show could not have been served by substituted service on the California Secretary of State, *see* Cal. Corp. Code § 2111, or through the Inter-American Convention on Letters Rogatory, *see* 28 U.S.C. § 1781.

In any event, we have held that § 351 unconstitutionally burdens commerce. *Abramson*, 897 F.2d at 393 (holding that the California tolling statute is unconstitutional). Territorial is clearly engaged in foreign commerce. Thus, even if § 351 could apply to Territorial despite its being a foreign corporation, the statute of limitations cannot be tolled as to it without running afoul of the Commerce Clause.

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question to the California Attorney General and afford him thirty days to apply for a rehearing if he should determine that the public interest has not been fully protected by the judgment to be entered.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

ARGONAUT INSURANCE COMPANY,

Plaintiff,

vs.

HALVANON INSURANCE COMPANY,

Defendant

HALVANON INSURANCE COMPANY LIMITED,

Third Party Plaintiff

vs.

REASSURANCSIUMUM INDONESIA P.ST; SEGUROS LAS REPUBLICA S.A.; MILLI RESASURANS T.A.S.; ADMINISTRATIA ASIGURARILOR DE STAT; SEGUROS LA TERRITORIAL S.A.; ALLAMI BIZTOSTITO; NORTHWEST FACILITIES, INC.; C.J.V. ASSOCIATES, INC.; SRMC MANAGEMENT CORP.; M.T.R. AGENCIES, LTD.; DEPENDABLE INSURANCE AGENCIES LIMITED; PLANET COVERAGES, INC.; INRAM

CASE NO. 99-MC-108

Order Denying Halvanon/Czarina's Ex Parte Application for a Writ of Execution Against a Third Party, Application for a Judgment Debtor Examination, and Application for Partial Enforcement of the Judgment

(Filed Nov. 22, 1999)

Third party plaintiff, Halvanon Insurance Company ("Halvanon"), obtained a default judgment against

various defendants, including Seguros La Territorial, S.A. ("Territorial"), in the United States District Court for the Southern District of New York in 1984. Czarina, the assignee of Halvanon's interest in the judgment against Territorial, has registered the judgment in this court. Czarina alleges that ADA VIS Global Enterprises ("ADA VIS") holds funds and a certificate of deposit belonging to Territorial. Czarina has requested that the court issue a writ of execution against ADA VIS, and that the court conduct a judgment debtor examination of ADA VIS. Czarina has also applied to this court for partial enforcement of the judgment. For the reasons stated below, the court denies Czarina's *Ex Parte Application for a Writ of Execution Against a Third Party, Application for a Judgment* Debtor Examination, and Application for Partial Enforcement of the Judgment.

BACKGROUND

The underlying litigation in this case arises out of an international reinsurance dispute. Halvanon, an Israeli company, reinsured Argonaut Insurance Company ("Argonaut") and ceded the risks to several companies, including Territorial, a Mexican Company. In 1980, Argonaut sued Halvanon in the United States District Court for the Southern District of New York to recover under the reinsurance agreements. In 1982, Halvanon impleaded Territorial. In 1984, Halvanon was awarded a default judgment against Territorial and two other entities, holding them jointly and severally liable to indemnify Halvanon for the $650,000 it had been ordered to pay Argonaut, plus interest, costs and attorneys fees resulting in a total default judgment of $961,405.83. Halvanon was subsequently liquidated.

On May 14, 1998, Halvanon's liquidators assigned Halvanon's interest in the 1984 default judgment to Czarina, L.L.C. ("Czarina"), a Delaware limited liability company. The Deed of Assignment states: "They [Territorial] have rigorously contested [the judgment's] validity and legal opinion advises that due to the age of the judgment it is now only enforceable in the state of New York." *See* Application for Examination and Order in Aid of Partial Enforcement of Judgment, App. A. Nevertheless, on January 27, 1999, Czarina registered the 1984 judgment in the United States District Court for the Southern District of California. Czarina began collection activities on the registered judgment on February 10, 1999. On that date, it obtained a writ of execution against Territorial in the amount of $1,254,034.13.

Czarina maintains that ADA VIS is a broker for Territorial and holds funds belonging to it. Accordingly, on April 5, 1999, Czarina filed a judgment creditor's lien against any Territorial property in the possession of ADA VIS. Christopher Davis, principal and owner of ADA VIS, denies that ADA VIS is holding any Territorial assets. Furthermore, Mr. Davis asserts that Territorial owes ADA VIS money. *See* Davis Declaration ¶ 1. Czarina sought a temporary restraining order to freeze all ADA VIS bank accounts. On May 28, 1999, the court denied Czarina's motion. However, the court ordered ADA VIS to refrain from transferring a certificate of deposit in its possession or any funds to Territorial until further order. In its May 28, 1999 order, the court also referred this case to Magistrate Judge Brooks for further proceedings.

Czarina obtained documents from ADA VIS relating to its dealings with Territorial. On August 9, 1999, Magistrate Judge Brooks heard oral argument on Czarina's Ex Parte Application for Issuance of a Writ of Execution on Third Party ADA VIS and Application for Examination and for Order in Aid of Partial Enforcement of Judgment. Shaun Hanson appeared on behalf of ADA VIS. Scott Savary and Mary Veed appeared on behalf of Czarina. In its applications to the court, Czarina ask the court to 1) order the two partners of ADA VIS to appear for examination regarding any debts ADA VIS owes to Territorial; 2) determine that ADA VIS is indebted to Czarina and is holding Territorial assets; 3) forbid ADA VIS from transferring Territorial's assets; and 4) apply the Territorial assets in ADA VIS's possession to the registered 1984 judgment.

On September 4, 1999, Magistrate Judge Brooks issued a Report and Recommendation, recommending that Czarina's Ex Parte Application for Issuance of a Writ of Execution on Third Party ADA VIS and Application for Examination and for Order in Aid of Partial Enforcement of Judgment be denied and that the case be terminated with prejudice. On October 12, 1999, Czarina filed objections to the Report and Recommendations. On November 8, 1999, ADA VIS filed a memorandum in support of the Report and Recommendation. Czarina filed additional objections on November 15, 1999.

DISCUSSION

I. Legal Standard

Czarina registered the 1984 Southern District of New York judgment in this district on January 27, 1999 pursuant to the federal registration statute, 28 U.S.C. §1963. Under the statute,

> A judgment in an action for the recovery of money or property entered in any court of appeals, district court . . . may be registered by filing a certified copy of the judgment in any other district. . . . A judgment so registered shall have the same effect as a judgment of the district court of the district where registered and may be enforced in like manner. 28 U.S.C. §1963

Because the federal registration statute does not contain any time limits, registration and enforcement of a judgment is [sic] controlled by the rules of the state of registration. *See Matanuska Valley Lines, Inc. v. Molitor*, 365 F.2d 358, 359-60 (9th Cir. 1966), *cert. denied*, 386 U.S. 914 (1967). Federal Rule of Civil Procedure 69(a) states:

> (a) In General. Process to enforce a judgment for the payment of money shall be a writ of execution, unless the court directs otherwise. The procedure on execution, in proceedings supplementary to and in aid of a judgment, and in proceedings on and in aid of execution shall be in accordance with the practice and procedure of the state in which the district court is held. FED. R. CIV. P. 69(a).

Therefore, the California statute of limitation governs the registration and enforcement of the 1984 New York judgment in this case.

The California statute of limitation for an action to enforce a judgment is ten years. California Code of Civil Procedure §683.020 states:

> Except as otherwise provided by statute, upon expiration of 10 years after the date of entry of a money judgment or a judgment for possession or sale of property:
>
> (a) The judgment may not be enforced.
>
> (b) All enforcement procedures pursuant to the judgment or to a writ or order issued pursuant to the judgment shall cease.
>
> (c) Any lien created by an enforcement procedure pursuant to the judgment is extinguished. CAL. CODE CIV. P. §683.020.

This ten-year period of enforceability cannot be tolled. *See Pratali v. Gates*, 4 Cal.App.4th 632, 638 (Ct. App. 1992). Section 683.050 states that "[n]othing in this chapter [enforcement and renewal of judgments] limits any right the judgment creditor may have to bring an action on a judgment, but any such action shall be commenced within the period prescribed by Section 337.5." California Code of Civil Procedure §337.5 states that the time period for commencing an action upon a judgment is ten years. Although an action on a judgment may be brought with the ultimate goal of enforcing the prior judgment, "the law draws a distinction between statutory proceedings to 'enforce' a judgment and a separate independent action 'on' the judgment" *Barkley v. Blue Lake*, 18 Cal.App.4th 1745, 1748 (Ct.

App. 1993). Under California law, an enforcement proceeding is different from an action on a judgment. *See Pratali v. Gates*, 4 Cal.App.4th at 637. In an enforcement proceeding, the ten-year statute of limitation under §683.020 cannot be tolled. However, in an action on a judgment, the §337.5 statute of limitation may be tolled under §351 by the debtor's absence from the state. *See Green v. Zissis*, 5 Cal.App.4th 1219, 1222 (Ct. App. 1992). Whether §683.020 or §337.5 governs a registration of a judgment was decided by the Ninth Circuit in *Marx v. Go Publishing Co.*, 721 F.2d 1272 (9th Cir. 1983). The Ninth Circuit held that the registration, pursuant to the federal registration statute, of a 1971 District of Columbia judgment in California in 1980, constituted an action upon a judgment and was governed by California Code of Civil Procedure §337.5. Accordingly, the limitation period in §337.5 applies to this case.

ADA VIS asserts that this action is barred by the ten-year statue [sic] of limitations under §337.5. Czarina claims that a statute of limitations defense is a personal defense and may not be asserted by a third party. In addition, even if ADA VIS could assert the defense, Czarina alleges that the ten-year statute of limitations under §337.5 is tolled in this case because Territorial is a Mexican corporation that has not been within California since the judgment was entered in 1984. California Code of Civil Procedure §351 provides for tolling "[i]f when the cause of action accrues against a person, he is out of the state." Cal. Code Civ. P. §351. However, the California Court of Appeal has held that §351 tolling does not apply to foreign corporations because "of the California statutory provisions relative to service of

summons upon foreign corporations [which provide for service on the Secretary of State]." *Loope v. Greyhound Lines, Inc.*, 114 Cal.App.2d 611, 614 (Ct. App. 1952). *Loope* continues to be the law in California. *See Cardoso v. American Medical Systems, Inc.*, 183 Cal.App.3d 994, 999 (Ct. App. 1986).

II. Analysis

A. ADA VIS May Assert the Statute of Limitation Defense

Generally, a statute of limitation is a personal defense which can only be raised by the debtor. *See Johnson v. Ware*, 58 Cal.App.2d 204, 206 (Ct. App. 1943). Czarina asserts that ADA VIS does not have standing to assert that the action is barred by the statute of limitation. However, ADA VIS claims that it is owed money by Territorial and stands to lose funds which Czarina claims are being held for judgment-debtor Territorial

> Although it is generally true that the statute of limitations is a plea personal to the debtor, it is nevertheless established that where there is a privity between the party who could, if sued, plead the statute and the party offering to plead it, the latter may plead it to save his property.

Boys Town U.S.C. Inc. v. The World Church, 349 F.2d 576, 579 (9th Cir. 1965), *cert. denied*, 383 U.S. 910 (1966). The court therefore adopts Magistrate Judge Brooks's finding that, as an interested party threatened with losing funds over which it has a claim, ADA VIS has standing to assert the statute of limitation and

argue that the judgment is unenforceable due to the passage of time.

B. Statute of Limitation is Not Tolled Under California Code of Civil Procedure §351

Czarina argues that this action upon a judgment under California Code of Civil Procedure §337.5 is not barred by the ten-year statute of limitation. Czarina claims that Territorial is a Mexican corporation with no facilities in the United States and that Territorial has not been within the state of California at any time after the New York judgment was entered in 1984. *See* Reply at 7. Czarina asserts that, in 1995, Territorial began selling automotive insurance to United States drivers, providing them coverage while driving in Mexico. *See* Objection to Report and Recommendation at 3. Czarina claims that ADA VIS acted as Territorial's agent in the United States and holds funds belonging to Territorial.

Czarina is not entitled to tolling for Territorial's absence. First, California Code of Civil Procedure §351, which allows for tolling of the ten-year time limit under §337.5 does not apply to foreign corporations. *See Loope v. Greyhound Lines, Inc.*, 114 Cal.App.2d at 614. In *Cardoso v. American Medical Systems*, the court stated:

> Therefore, under *Loope* and its progeny, the availability of substituted service of process upon a foreign corporation renders the tolling provisions of section 351 inapplicable. To rule otherwise would result in the anomalous situation that a statute of limitations would never run in actions filed against foreign corporations. *Cardoso*, 183 Cal.App.3d at 999.

Because Territorial is a foreign corporation, Czarina cannot benefit from §351 tolling. Czarina argues that, prior to 1995, Territorial was not amenable to service through any method because it lacked "minimum contacts" with California. Therefore, substituted service of process was not available until after the ten-year period had passed. However, ADA VIS has argued that California Code of Corporations §2111 would have allowed substituted service on the secretary of state during the ten-year time limit. *See* Memorandum in Support of Report and Recommendation at 5. In addition, ADA VIS has asserted that the Inter-American Convention on Letters Rogatory, ratified August 27, 1988 and entered into by Mexico and the United States, would have provided for substituted service on Territorial after 1988. *See* 28 U.S.C. §1781. Czarina has failed to show that service of process was unavailable during the ten-year time limitation and that §351 tolling should apply in this case.

Second, the Ninth Circuit has determined that §351 is unconstitutional as applied to defendants who participate in interstate commerce because it violates the Commerce Clause of the United States Constitution. *See Abrahamson v. Brownstein*, 897 F.2d 389, 392 (9th Cir. 1990); *see also Papenthien v. Papenthien*, 1995 WL 819033 at *2 (S.D. Cal. 1005) (Judge Rhoades) *rev'd on other grounds*, 120 F.3d 1025 (9th Cir. 1997). The Commerce Clause provides that Congress shall have power "To regulate Commerce with foreign Nations, and among the several States, and with Indian Tribes." Art. 1 §8, cl. 3. In *Abramson*, the Ninth Circuit found that §351

> [F]orces a nonresident individual engaged in interstate commerce to choose between being present in California for several years or forfeiture of the limitations defense, remaining subject to suit in California in perpetuity."
>
> *Abramson*, 897 F.2d at 392.

The Ninth Circuit relied on the Supreme Court's decision in *Bendix Autolite Corp. v. Midwesco Enterprises*, 486 U.S. 888 (1988), in which the Court stated "Although statute of limitations defenses are not a fundamental right . . . [t]he State may not withdraw such defenses on conditions repugnant to the Commerce Clause." *Bendix*, 486 U.S. at 893. Therefore, even if §351 could apply to Territorial despite the fact that it is a foreign corporation, tolling the statue [sic] of limitations in this case runs afoul of the Commerce Clause.

CONCLUSION

The court finds that this action is barred by the ten-year statute of limitation for an action upon a judgment under California Code of Civil Procedure §337.5. Accordingly, the court adopts the Report and Recommendation of Magistrate Judge Brooks and orders that:

> (1) the January 27, 1999 registration of the foreign judgment is vacated because it is barred by the ten-year statute of limitation;
>
> (2) the writ of execution issued February 11, 1999 is vacated;
>
> (3) Czarina's application for a judgment debtor examination and for partial enforcement of the registered 1984 judgment is denied as moot; and

(4) the May 28, 1999 Order Denying Czarina's Application for a Temporary Restraining Order preventing ADA VIS from transferring funds to Territorial is vacated.

This case is closed with prejudice.

IT IS SO ORDERED.

DATED: 11/18/97

/s/ Marilyn L. Huff
MARILYN L. HUFF,
CHIEF JUDGE
UNITED STATES
DISTRICT COURT

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

JUDGMENT IN
A CIVIL CASE

Case Number:
3:99-cv-01578

(Filed Dec. 9, 1999)

Czarina LLC – plaintiff

v.

Seguros – defendant

___ JURY VERDICT. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

_x_ DECISION BY COURT. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered

IT IS ORDERED AND ADJUDGED that the Court grants Defendant's motion to dismiss for failure to state a claim FRCP 12(b)5 and 6 [6-1] with prejudice

12/9/99
Date

Roberta Westdal
Clerk

/s/ [Illegible]

Entered on 12/10/99

pre – Rhoades
ref – Aaron

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

CZARINA, L.L.C., Plaintiff, v. SEGUROS LA TERRITORIAL S.A., Defendant.	CIVIL NO. 99-1578-R ORDER GRANTING MOTION TO DISMISS (Filed Dec. 9, 1999)

I. Overview

Defendant Seguros La Territorial S.A. ("Seguros") has filed motions to dismiss (1) for defective service of process and (2) for failure to state a claim because the statute of limitations bars the complaint. For the reasons stated herein, the Court dismisses the complaint on the second ground.

II. Background and Discussion

In 1984, the United States District Court for the Southern District of New York awarded Halvanon Insurance Company ("Halvanon") a default judgment for $961,405.83 against Seguros as part of a reinsurance dispute involving several international parties. Subsequent to the judgment, Halvanon went bankrupt and was liquidated. Halvanon's liquidators assigned the right to collect the 1984 default judgment to Plaintiff Czarina, L.L.C. ("Czarina").

On January 27, 1999, Czarina registered the default judgment in the United States District Court for the Southern District of California and sought a writ of

execution, judgment debtor examination, and partial enforcement of the judgment against the California assets of Seguros. *See Argonaut Ins. Co. v. Halvanon Ins. Co.*, Misc. No. 99-108 (S.D. Cal. filed Nov. 11, 1999). Magistrate Brooks, to whom Chief Judge Huff referred the matter, recommended denial of the relief sought because California's ten-year statute of limitations for enforcement of a judgment had run prior to Czarina's registration. On November 18, 1999, after the parties filed objections to Magistrate Brooks' report and recommendation, Chief Judge Huff issued an order holding that the relief sought is barred by the statute of limitations.

Czarina filed the complaint in the case before this Court on July 28, 1999, while the matter decided by Judge Huff was still pending. The complaint seeks to collect on the same 1984 default judgment that was the subject of the miscellaneous action before Chief Judge Huff.[1] The action before this Court is just the matter before Chief Judge Huff in different guise; it is fashioned as a civil complaint rather than a registration of judgment.[2] More

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[1] The caption for the matter before Chief Judge Huff includes the parties to the original action in which the district court for the Southern District of New York entered the default judgment against Seguros. In that regard, while comparison of the captions may suggest that the parties in that action differ from those before this Court, both actions were filed by Czarina to collect on the same default judgment against Seguros. Therefore, despite their different captions, the two actions are the same.

[2] Significantly, the only reason that the current action was not consolidated with the matter before Chief Judge Huff is that the latter, as a registration of judgment, is a "miscellaneous case." The procedures of the Clerk's Office for the Southern District of California foreclose consolidation of civil cases and miscellaneous matters.

importantly, the issue of whether the matter is barred by the statute of limitations is factually and legally identical to the statute of limitations issue decided by both Magistrate Brooks and Chief Judge Huff. Indeed, Czarina's opposition to the motion to dismiss merely refers the Court to the arguments presented to Magistrate Brooks and Chief Judge Huff, which Judge Huff rejected in a well-reasoned order.

The Court lacks both the power and the inclination to contradict Judge Huff's ruling. First, Judge Huff's final ruling on the statute of limitations issue precludes the Court from reconsidering that issue in this case. "Where two actions involving the same issue are pending between the same parties, ' . . . it is the first final judgment rendered in one of the courts which becomes conclusive in the other as res judicata.'" *Westwood Chemical Co. v. Kulick*, 656 F.2d 1224, 1227 (6th Cir. 1981) (citing *Chicago R. I. & P. RY. Co. v. Schendel*, 270 U.S. 611, 616-17 (1926)); *see also Americana Fabrics, Inc. v. L&L Textiles, Inc.*, 754 F.2d 1524, 1528 (9th Cir. 1985) ("When the same claim or issue is litigated in two courts, the second court to reach judgment should give res judicata effect to the first, regardless of the order in which the two actions were filed."). Second, after reviewing the applicable law, the Court finds the reasoning of Judge Huff's order irreproachable. Consequently, even if the Court did rule independently on the merits of this matter, the Court would dismiss the complaint as barred by the statute of limitations. Therefore, for the reasons stated in Chief Judge Huff's November 11, 1999 order in *Argonaut Ins.*

Co. v. Halvanon Ins. Co., Misc. No. 99-108, the Court finds that the complaint is barred by the statute of limitations.[3] Accordingly, the Court dismisses the case with prejudice.

III. Conclusion

For the reasons stated above, the Court grants Defendant's motion to dismiss for failure to state a claim upon which relief can be granted. The complaint is dismissed with prejudice.

IT IS SO ORDERED:

Date: 12/8/99

/s/ John S. Rhoades
John S. Rhoades, Sr.
United States District Judge

Copies to:

All Parties
Magistrate Judge

[3] Because the Court holds that the complaint is barred by the statute of limitations, it does not reach the issue of defective service of process.

ARGONAUT INSURANCE COMPANY, Plaintiff, v. HALVANON INSURANCE COMPANY, Defendant.	No. 99-57012 DC# CV-99-00108-MLH/RBB Southern District of California ORDER (Filed Jul. 10, 2002)
HALVANON INSURANCE COMPANY, Third-Party-Plaintiff-Appellant, v. REASURANSI UNUM INDONESIA, SEGUROS LA REPUBLICA S.A.; MILLI RESASURANS T.A.S.; ADMINISTRATIA ASIGURARILOR DE STAT; KEMPER DE MEXICO, CAMPANIA DE SEGUROS S.A.; ALLAMI BIZTOSTITO; NORTHWEST FACILITIES INC; C.J.V. ASSOCIATES, INC.; SRMC MANAGEMENT CORP; M.T.R. AGENCIES LTD; DEPENDABLE INSURANCE AGENCIES LIMITED; PLANET COVERAGES, INC.; INRAM; ADA VIS GLOBEL ENTERPRISES, Third-Party-Defendants-Appellees.	

CZARINA LLC, Plaintiff-Appellant, v. SEGUROS LA TERRITORIAL, Defendant-Appellee.	No. 99-57013 DC# CV-99-01578-JSR (CGA) Southern District of California

Before: RYMER and RAWLINSON, Circuit Judges, and POGUE,* CIT Judge.

The panel has voted unanimously to deny Czarina's petition for rehearing. Judges Rymer and Rawlinson voted to deny the petition for rehearing en banc and Judge Pogue so recommends.

The full court has been advised of the petition for rehearing en banc, and no judge of the court has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

Czarina's petition for rehearing and petition for rehearing en banc are DENIED.

* Honorable Donald C. Pogue, Judge, Court of International Trade, sitting by designation.

CONSOLIDATED APPEALS
NO. 99-57012 & NO. 99-57013

NINTH CIRCUIT COURT OF APPEALS

ARGONAUT INSURANCE COMPANY, Plaintiff, vs. HALVANON INSURANCE COMPANY, Defendant.	)	No. 99-57012
HALVANON INSURANCE COMPANY, Third Party Plaintiff/Appellant, vs. REASURANSI UMUM [sic] INDONESIA; et al. Third Party Defendant/Appellees.	)	
CZARINA L.L.C., Plaintiff-Appellant, vs. SEGUROS LA TERRITORIAL S.A., Defendant-Appellee.	)	No. 99-57013

APPEAL FROM THE UNITED STATED [sic]
DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF CALIFORNIA

APPELLEE'S PETITION FOR REHEARING

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* * *

[3] Thus, the record establishes that the Inter-American Convention was raised by both of the parties in the Ada Vis Action on more than one occasion. Indeed, Czarina acknowledged that it could have served La Territorial under [4] the Convention as early as 1988, but offered neither an explanation nor evidence regarding its failure to do so.

As a result, the district court in the Ada Vis Action, Judge Huff, explicitly found that:

> ADA VIS has asserted that the Inter-American Convention on Letters Rogatory, ratified August 27, 1998 and entered into by Mexico and the United States, would have provided for substituted service on Territorial after 1988. *See*, 28 USC §1781. Czarina has failed to show that service of process was unavailable during the ten-year time limitation and that §351 tolling should apply in this case.

ACR 39, p. 7:28 and 8:1-4; CER A(1). Accordingly, the district court in the Ada Vis Action did directly address the application of the Inter-American Convention. As explained below, in the subsequent action between Czarina and La Territorial, both the parties and the court

incorporated by reference and by judicial notice the papers and findings of the Ada Vis Action.

* * *